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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Written statement submitted by the Four Directions Council, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[3 July 1991]

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PROTECTION OF CULTURAL PROPERTY ... PART I

1. For indigenous peoples, as for all other peoples, the control of cultural property is a means by which they can "gain consciousness of their own dignity", and exercise their right to continue to "develop their own culture". Reference is made to the UNESCO recommendation concerning the preservation of cultural property endangered by public or private works (1968), and the UNESCO Declaration of the Principles of International Cultural Co-operation (1966).

2. Indigenous peoples have been particularly vulnerable to the loss of their material cultural heritage. Generally viewed as "backward", they were the objects of aggressive policies of cultural assimilation. Their most precious historical and religious objects were not regarded as world treasures and were often simply destroyed, like the libraries of the Nahuatl and Maya peoples. Their bodies were frequently seen as having greater scientific interest than their art, and were avidly collected by European museums. Today, tourism and a growing market in "primitive" art threaten the few significant objects that still remain in indigenous peoples' own hands. Unfortunately, this is promoted by many of the States in which indigenous people live. What has not yet been destroyed by colonial empires, is being exploited commercially by post-colonial States. The growing popularity of indigenous peoples and their struggles will increase the demand for their cultural works, ironically, and increase the danger of theft.

Scope of "cultural property"

3. Cultural property has been defined for international purposes as objects "which are of major importance for the cultural identity and history of countries". (See International Council of Museums (ICOM), "Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages", Museum 31(1):62-67 (1979)). There can be a great difference of opinion as to whether a particular object is "important".

4. The scope of "cultural property" should be defined by indigenous peoples themselves, and their own traditional laws. This approach has been taken in several national legal systems. The Cultural Heritage Act No. 3501 (1979) of Ecuador protects "manifestations which the natives themselves have acknowledged as recurrent and valid means of expression and identification of their culture". In Australia, the Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987, allows indigenous communities themselves to designate sites and objects as significant. Under the United States' Native American Graves Protection and Repatriation Act, Public Law 101-601 (1990), the "cultural patrimony" of indigenous peoples includes any object "having ongoing historical, traditional, or cultural importance central to the Native American culture itself". 1/

5. Indigenous peoples' own conception of cultural property includes sacred and historical sites; objects of special religious, cultural or historical significance; human remains and associated archaeological materials; and individual artistic works, artifacts and handicrafts, music, folklore and designs, if they contain protected or proprietary symbols. In many cases,

the looting of an indigenous culture has been so extensive, that the people concerned regard any surviving object as an important and indispensable link with their history and identity.

Determination of ownership

6. As a general rule, courts will return a stolen object on demand. Whether the object was stolen is determined by the laws of the State where the purported theft occurred. (For example, Kunstsammlungen zu weimar v. Elicofon, 678 F.2d 1150 (2nd Cir. 1982); Menzel v. List, 246 N.E.2d 742 (New York 1969)). This rule is not always easily applied, however. In the case of the Parthenon marbles, the British Museum has argued that their removal from Greece was permitted under the law of an occupying power (Turkey). The same argument was made in a recent case involving the removal of Byzantine mosaics from a church in the Turkish-occupied portion of Cyprus. A United States court decided that the Turkish occupation had not suspended Cypriot law. (Autocephalous Greek Orthodox Church of Cyprus v. Goldberg, 917 F.2d 278 (7th Cir. 1990)).

7. The claim that an object was stolen from its true owner is more likely to succeed than a claim that it was exported in violation of national cultural-patrimony laws. Attorney-General of New Zealand v. Ortiz [1982], All ER 432, rejected an attempt by New Zealand to recover some important Maori door panels from London. New Zealand had relied upon its export-control laws rather than ownership by a specific Maori tribe. In contrast, India successfully brought legal actions in the United States and the United Kingdom to recover sacred statues of Siva taken illegally from the ruins of Hindu temples. The temples and Siva were named as co-plaintiffs in accordance with Hindu law, recognizing the "cultural ownerhsip", rather than State ownership, of the statues. Significantly, the British court decided that the temples and the god were proper parties since Hindu law would have been applied by a court in India. (Greenfield, The Return of Cultural Treasures (1989)).

8. Recognition and publication of indigenous peoples' traditional laws would deprive purchasers of the defence of having no knowledge that the object was improperly acquired. If the object is well known, or well documented, courts will apply the principle of caveat emptor (Autocephalous Greek Orthodox Church v. Goldberg; United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974)). If the legal status of the objects is uncertain, however, courts are reluctant to regard the purchaser as a thief (United States v McClain, 545 F.2d 988 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1979); DeWeerth v. Baldinger, 836 F.2d 103 (2nd Cir. 1987); United States v. Diaz, 499 F.2d 113 (9th Cir. 1974)).

9. The ICOM Code of Ethics (1971) encourages museums to consult with the cultural authorities of the country of origin before acquiring any doubtful object. When a museum acquires a culturally important object without contacting the country of origin, it should not be considered an "innocent" purchaser. At the same time, it is important to involve indigenous peoples directly in the work of the national ministries and agencies responsible for cultural matters in each country, so they can give complete and accurate information when asked by foreign museums.

Problems of competing interests

10. In many countries, indigenous peoples are not recognized as legal entities capable of owning property collectively, or of bringing legal actions in national courts. They must also rely on States to protect their interests in international legal proceedings. 2/

11. Most Latin American States have nationalized their pre-Colombian artifacts in an effort to protect them. State ownership can conflict with the interests of indigenous peoples, however. When the Afo-A-Kom statue was returned to Cameroon in 1974, a dispute arose between State authorities and the Kom people over custody. It was eventually agreed to return it to its traditional site in Kom territory, rather than the national capital. The Government of Australia has returned aboriginal materials repatriated from other countries to their aboriginal owners. In many other countries, however, repatriated objects are kept by the State itself and not returned to the peoples who produced them.

12. Three justifications are typically given for withholding cultural objects from indigenous peoples:

(a) The objects have acquired wider significance, becoming part of the cultural heritage of the nation as a whole (or the world);

(b) The objects are needed for study, and for teaching about the cultures which made them;

(c) The peoples who made the objects are unable to conserve them properly, and will allow them to deteriorate.

(Fenton, "The return of eleven wampum belts to the Six Nations Iroquois Confederacy on Grand River, Canada" Ethnohistory 36(4):392-410 (1989)). Similar objections were once made in Denmark, to returning manuscripts of the Icelandic sagas to Iceland. (Greenfield, The Return of Cultural Treasures). Developing countries are also faced with these objections, which ICOM has fashioned into a general principle - "the primacy of the object". ("Study on the Principles, Conditions and Means", op. cit.).

13. Courts in Australia and the United States recognize the standing of indigenous peoples to bring legal actions to enjoin desecrations of cultural sites, even on privately owned lands. (Onus v. Alcoa, 36 ALR 425 (High Court, 1981); Charrier v. Bell, 496, So.2d 691 (Louisiana Court of Appeal, 1986)). In recent United States cases, however, the religious interests of indigenous peoples have been held to be secondary to the property rights of the national Government (Fools Crow v. Gullet, 541 F.Supp. 785 (District of South Dakota, 1982); Lying v. Northwest Indian Cemetary Protective Association, 485 U.S 439 (1988)).

Notes

1/ We note that the term "patrimony" is gender-biased, and would prefer a term which acknowledges the fact that, more often than not, indigenous peoples inherit cultural property through their mothers.

2/ In a border dispute with Thailand, Cambodia argued that the Khmer origins of a ruined temple meant that it must belong on the Cambodian side of the border. The Court dismissed the cultural affiliations of the temple as irrelevant. Case Concerning the Temple of Preah Vihear, ICJ Reports 1962, p. 6.